

SERVED: May 17, 1993

NTSB Order No. EA-3880

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of May, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11371
v.)	
)	
VICTOR D. LEVINE,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Patrick G. Geraghty at the conclusion of an evidentiary hearing held in this case on April 9, 1991.¹ In that decision, the law judge affirmed in part an order of the Administrator suspending respondent's commercial pilot certificate, and modified the period of suspension from 90

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

days to 75 days.²

The law judge found that, as alleged in the complaint, respondent's operation³ of a Cessna 182J with a missing right wing tip after a condition notice had been placed on the aircraft stating that operation of the aircraft would be contrary to the Federal Aviation Regulations, was in violation of 14 C.F.R. sections 91.27(a)(1) and 91.29(a) and 91.167(a)(1).⁴ In

² The Administrator did not appeal from the reduction in sanction, or from the law judge's finding that respondent did not violate 14 C.F.R. 91.167(a)(2) [now recodified as 91.407(a)(2)] (operation of an aircraft after alteration without making required maintenance record entry).

³ The subject flight occurred on February 13, 1990, and went from Burbank-Glendale-Pasadena Airport to Riverside Municipal Airport.

⁴ Section 91.27(a)(1) [now recodified as 91.203(a)(1)] provided, in pertinent part:

§ 91.27 Civil aircraft: Certifications required.

(a) Except as provided in § 91.28, no person may operate a civil aircraft unless it has within it the following:

(1) An appropriate and current airworthiness certificate.

Section 91.29(a) [now recodified as 91.7(a)] provided:

§ 91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

Section 91.167(a)(1) [now recodified as 91.407(a)(1)] provided:

§ 91.167 Operation after maintenance, preventative maintenance, rebuilding, or alteration.

(a) No person may operate any aircraft that has undergone maintenance, preventative maintenance, rebuilding, or alteration unless --

(1) It has been approved for return to service by a person authorized under § 43.7 of this chapter.

addition, respondent admitted in his answer to the complaint that he violated 14 C.F.R. 61.3(c) in connection with that same flight, because he did not have in his possession a current medical certificate. The law judge also concluded that respondent's violations were not inadvertent, and therefore, he was not entitled to immunity from sanction based on his filing of two reports (one pertaining to his operation of the aircraft with a missing wing tip, and another pertaining to his failure to timely renew his medical certificate) under the Aviation Safety Reporting Program (ASRP).

On appeal, respondent argues that there was no probative evidence that the lack of a wing tip rendered the aircraft unairworthy. He asserts that an FAA inspector's testimony that, after removal of the wing tip the aircraft no longer conformed to its type certificate, was of no value because the inspector had not examined the Cessna 182J type design drawings and specifications. He also challenges the law judge's reliance on his own knowledge and experience ("I know of no aircraft that is certified with only one wing tip" (Tr. 88)) to support his finding that without its right wing tip the aircraft did not meet its type certificate.

Respondent further argues that section 91.167(a)(1) is inapplicable because the missing right wing tip was the result of theft, which should not be considered an "alteration" within the meaning of that regulation. Finally, respondent maintains that any violations he committed were inadvertent, and are covered by

the sanction immunity provisions of the ASRP. The Administrator has filed a reply brief opposing the appeal.

For the reasons discussed below, we deny respondent's appeal and affirm the initial decision.

There is ample support in the record for the law judge's finding that, after removal of the right wing tip, respondent's aircraft failed to conform to its type certificate and was thus unairworthy.⁵ Although the FAA maintenance inspector who testified to that effect had not seen type design drawings for the Cessna 182J, he testified that he had examined drawings for other Cessna Century series aircraft, including the Cessna 182, and that he knew "for a fact" that the type design drawings for the Cessna 182J would show two wing tips. (Tr. 38-9.) Respondent offered nothing to rebut that testimony and, indeed, does not dispute its accuracy.

Having already proffered un rebutted expert testimony, the Administrator was not also required to produce the type design drawings themselves. Furthermore, it was not error for the law judge to credit that testimony in light of his own knowledge and experience. See Administrator v. Hill, 5 NTSB 1447, 1455 (1986) and Administrator v. Christopherson, 5 NTSB 209, 211 (1986). In

⁵ Before an aircraft may be considered airworthy, it "(1) must conform to its type certificate, if and as that certificate has been modified by supplemental type certificates and by Airworthiness Directives; and (2) must be in condition for safe operation." Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992), citing Administrator v. Doppes 5 NTSB 50, 52 n. 6 (1985). The Administrator's position in this case is that respondent's aircraft did not conform to its type certificate.

sum, respondent has presented no persuasive reason for reversal of the section 91.27(a)(1) and 91.29(a) violations.⁶

Respondent's argument that the section 91.167(a)(1) violation cannot stand because that regulation does not contemplate alteration which results from theft or vandalism, requires little comment. We agree with the law judge that removal of the right wing tip from respondent's aircraft constituted an alteration, and that alteration need not be accomplished by a mechanic to fall within the purview of the regulation. (Tr. 92.) Respondent's narrow interpretation of the word "alteration" is unsupported by law or policy.

Finally, we uphold the law judge's rejection of respondent's claim to immunity from sanction pursuant to the ASRP, based on his findings that respondent's violations were not inadvertent.⁷

Regarding respondent's lack of a current medical certificate, the law judge rejected as incredible respondent's claim of inadvertence (see Tr. 58). Noting that: (1) respondent has been

⁶ The section 91.27(a)(1) charge (operation of an aircraft without an appropriate and current airworthiness certificate) was apparently predicated on the Administrator's position that the otherwise appropriate airworthiness certificate on board respondent's aircraft was rendered invalid because of the aircraft's unairworthy condition. (Tr. 32, 34.) Because both parties have treated this charge as turning solely on the issue of whether the aircraft was unairworthy, we have accepted that premise without further analysis for the purpose of this decision. We agree with respondent, however, that the 91.27(a)(1) charge is purely residual to the 91.29(a) charge, in that both stem from the same conduct. Accordingly, the 91.27(a)(1) violation contributes nothing to sanction.

⁷ The sanction immunity provision of that program does not apply unless the violation is "inadvertent and not deliberate." See Ferguson v. NTSB, 678 F.2d 821 (9th Cir. 1982).

a certificated pilot for seventeen years, and thus would be well aware of his medical certificate's periodic renewal requirement; (2) respondent is a well-educated individual and a medical doctor; and (3) his medical certificate was expired by almost fourteen months; the law judge concluded, "I cannot believe that this is simply a matter of inadvertence . . . The doctor has been flying for a long period of time and he knew or should have known that his medical certificate had expired." (Tr. 94-5.) Because respondent has not shown this finding to be arbitrary or capricious, we will not disturb it. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

The law judge's finding that respondent's operation of an unairworthy aircraft was not inadvertent was based primarily on respondent's admitted receipt of the condition notice (Exhibit J-2) prior to the flight. The law judge found that, even if (as respondent claimed) he did not read the notice until he was already in flight, respondent knew or should have known the aircraft was considered unairworthy. (Tr. 95-6.)⁸

⁸ Even absent the condition notice, the Board would not consider respondent's violation inadvertent, because he was clearly aware of the fact that he was operating an aircraft with a missing wing tip. Respondent testified that, after being advised by a mechanic that it would not constitute a safety problem, he flew the aircraft nine times with the missing wing tip prior to the flight at issue. (Tr. 52-3.) The fact that he may not have been aware of the legal consequences of his actions does not make those actions inadvertent.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 75-day suspension of respondent's airman pilot certificate shall commence 30 days after the service of this opinion and order.⁹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁹ For the purpose of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).